

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES  
INTERNATIONAL UNION, et al.,

No. C 09-00404 WHA

Plaintiffs,

v.

SAL ROSSELLI, et al.,

**ORDER GRANTING IN PART  
PLAINTIFFS' MOTION FOR  
EXPENSES UNDER RULE 37**

Defendants.

Plaintiffs now move for expenses against defendant National Union of Healthcare Workers, for alleged disobedience of a court order concerning post-judgment discovery. The motion is **GRANTED IN PART**. Plaintiffs are entitled to expenses under Federal Rule of Civil Procedure 37(b)(2)(C) from NUHW in the amount of \$2500.00.

There has been excessive post-judgment drama in this action. On April 12, 2010, a money judgment was entered against the individual defendants and defendant NUHW. Plaintiffs attempted to execute judgment by, among other things, filing a writ of execution against one of NUHW's bank accounts. Since then, the situation devolved into a tussle over discovery from NUHW about its finances. On August 24, plaintiffs filed a motion to compel discovery. The basis for this motion was NUHW's refusal to produce both a deponent and documents concerning its financial condition (*see* Dkt. No. 781). An order set a deadline for opposition by defendants (September 6) and a hearing date on the motion (September 15).

1 In the meantime, on August 31 defendants asked for clarification — they wanted to know  
2 what percentage of the judgments against them they would have to post as a bond in order to  
3 obtain a stay of execution. An order clarified that the bond would have to be in the amount of  
4 125 percent of judgment (Dkt. No. 789).

5 Defendants filed an opposition on September 6. Then, on the eve of the hearing,  
6 defendants filed a form of proposed supersedeas bond, the form of which drew an objection from  
7 plaintiffs. On September 15, the parties met in the jury room to meet and confer. No agreement  
8 was reached. Then the motion to compel was heard. The hearing addressed both an acceptable  
9 form of bond for the individual defendants and discovery as to NUHW. Regarding a form of  
10 bond, the individual defendants were granted leave to post half of the 125 percent of judgment in  
11 cash with the Clerk of Court as well as file a statement under oath including certain required  
12 information. Regarding discovery, NUHW was ordered to turn over the documents requested by  
13 plaintiffs by September 24, and to produce Phyllis Willett for a deposition on October 7 at 9:00  
14 a.m.

15 A written order was entered that memorialized the orders from the hearing (Dkt. No. 796).  
16 That order stated:

17 Defendant NUHW shall produce . . . the documents requested by plaintiffs  
18 in their July 1, 2010 Notice of Deposition and Request to Produce  
19 Documents (Docket No. 780-1) (“Notice and Request”), with two  
20 modifications: (a) Defendant need not produce the items identified in  
21 request 8 or request 10 of the Notice and Request; and (b) the paragraphs  
22 of the Notice and Request that set forth January 1, 2010 as the cutoff date  
23 for production of documents shall be modified to set a March 1, 2010  
24 cutoff date.

25 These included: “All account statements . . . for all accounts of any type (including but not limited  
26 to bank accounts, . . . ) maintained in the name of National Union of Healthcare Workers [] *or for*  
27 *the benefit of NUHW or in which NUHW has any legal or beneficial interest*” (Dkt. No. 780-1)  
28 (emphasis added).

NUHW then did turn over some documents to plaintiffs. These included its general  
ledger. On September 30, however, plaintiffs filed this motion for expenses (Dkt. No. 801).  
Based on their review of documents that were produced, plaintiffs claimed that NUHW withheld  
documents that would identify: (1) a Siegel & Yee account that NUHW was allegedly using as its

1 operating account; (2) the location of \$265,000 withdrawn from a Mechanics Bank account on  
2 September 9; and (3) the state of NUHW finances subsequent to September 15. (Siegel & Yee  
3 are counsel for defendants herein.) Plaintiffs requested immediate relief. They needed the  
4 withheld documents in order to prepare for the deposition on October 7. NUHW was ordered to  
5 respond by October 3.

6 NUHW filed a three-page “response” to the motion, without any supporting documents or  
7 declarations (Dkt. No. 803). It flatly stated that plaintiffs were wrong and that NUHW had  
8 produced everything. For example, it stated that there are no documents concerning the Siegel &  
9 Yee account other than the general ledger entries. Based on this response, an order on October 4  
10 stated:

11 More facts are needed before the motion for sanctions can be resolved.  
12 ***Defendant NUHW is ordered to file a statement under oath*** identifying  
13 the bank and account number of the Siegel & Yee account listed in its  
14 general ledger, verifying that there are no documents concerning the  
15 Siegel & Yee account, and stating what happened to the \$265,000  
16 withdrawn from the Mechanics Bank account on September 9.

17 (Dkt. No. 804 (emphasis added).) This bears repeating: ***NUHW was ordered to file a statement***  
18 ***under oath*** explaining the Siegel & Yee account, among other things. The order required that the  
19 statement be filed by October 5. It also confirmed that the deposition should go forward on  
20 October 7. Anticipating that the deposition might yield more information relevant to the motion  
21 for expenses, the order also allowed further briefing from both parties by October 14. It set a date  
22 for a hearing on the motion: October 20 at 3:00 p.m.

23 Come October 5, however, ***NUHW did not file a statement under oath***. Instead, it filed  
24 another three-page “response” (Dkt. No. 805). It stated, “[c]ounsel has been unable to locate an  
25 [sic] NUHW representative authorized to respond . . . during the time allotted.” Instead, counsel  
26 briefly addressed — though not under oath — the substance that was required to be addressed by  
27 a statement under oath. Given counsel’s assertion that it had not had enough time to get a  
28 statement under oath, a new order “granted [NUHW] leave to file the requested statement under  
oath anytime through October 20, 2010, the date of the hearing on the motion for sanctions” (Dkt.  
No. 810).

1 Come October 5, NUHW did file a proposed supersedeas bond “application.” Notably,  
2 NUHW had not posted a bond with the Clerk or anyone else. A subsequent order responded,  
3 “defendant NUHW was not granted leave to post a supersedeas bond in the same manner as the  
4 individual defendants [had been]. In fact, discovery was granted as to defendant NUHW, and that  
5 discovery is ongoing” (Dkt. No. 811). Of course, NUHW was always free to post a bond in the  
6 amount of 125 percent of the judgment against it to obtain a stay of execution, as described above  
7 (*see* Dkt. No. 789), but it had not done so. The application was not the same thing because  
8 NUHW already knew what it had to do to obtain a stay of execution — post the money — and it  
9 did not need court approval of a new application to do that.

10 On the eve of the deposition set by court order for October 7, plaintiffs filed a notice that  
11 on that very evening (October 6 at 5:19 p.m.), Attorney Dan Siegel (representing NUHW and the  
12 deponent, Phyllis Willett) sent an e-mail to counsel for plaintiffs stating, “We will not be  
13 appearing for the deposition tomorrow. Instead we will post the bond, which will automatically  
14 stay execution and make your discovery moot.” Plaintiffs applied to compel the deposition,  
15 counsel having already traveled to San Francisco from Washington, D.C. to take the deposition.  
16 At 8:20 a.m. on October 7, an order stated that if a proper bond was posted in the Clerk’s office  
17 by 11:00 a.m. then Ms. Willett need not appear for the deposition. Though it is not clear at what  
18 time this occurred, NUHW posted the bond with the Clerk of Court in Oakland on October 7  
19 (Dkt. No. 816). Execution of judgment as to defendant NUHW was thus stayed (Dkt. No. 822).  
20 It appears that the deposition did not occur.

21 After all of this, we were left with the residual motion for expenses. As stated, the parties  
22 were granted leave to file further briefing by October 14. Only plaintiffs did so (Dkt. No. 824).  
23 At the time for the scheduled hearing on the motion, October 20 at 3:00 p.m., only plaintiffs’  
24 counsel appeared. The courtroom deputy called Attorney Dan Siegel, who was at his office. He  
25 spoke to the undersigned and plaintiffs’ counsel in open court over speakerphone. The hearing  
26 was continued to the next morning at 9:00 a.m. Attorney Siegel requested an opportunity to  
27 oppose plaintiffs’ brief in support of their motion, even though he had skipped his opportunity to  
28 do so on October 14. He was granted leave to file a response by 5:00 p.m. He filed a declaration

1 in which he (1) repeated content from NUHW's October 5 filing, and (2) apologized for his  
2 failure to appear at the hearing. The further hearing was held on October 21.\*

3 It bears repeating that the instant motion for expenses relates to defendant NUHW and not  
4 the individual defendants. This is a retrospective motion — again, execution of judgment is now  
5 stayed as to NUHW. But that does not moot the motion because expenses may still be warranted  
6 if NUHW violated a court order.

7 A party cannot disobey a court order with impunity. Federal Rule of Civil Procedure  
8 37(b)(2) states in part (emphasis added):

9 (A) For Not Obeying a Discovery Order. If a party or a party's officer,  
10 director, or managing agent — or a witness designated under Rule  
11 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit  
12 discovery, including an order under Rule 26(f), 35, or 37(a), the court  
13 where the action is pending may issue further just orders. They may  
14 include the following: . . .

15 (vii) treating as contempt of court the failure to obey any order except an  
16 order to submit to a physical or mental examination. . . .

17 (C) Payment of Expenses. Instead of or in addition to the orders above, the  
18 court must order the disobedient party, the attorney advising that party, or  
19 both to pay the reasonable expenses, including attorney's fees, caused by  
20 the failure, unless the failure was substantially justified or other  
21 circumstances make an award of expenses unjust.

22 Plaintiffs argue primarily that NUHW disobeyed the court order from the hearing on September  
23 15 that was subsequently memorialized in a written order (Dkt. No. 796). The theory is that  
24 NUHW did not produce all of the documents that it was ordered to.

25 Again, NUHW was ordered to turn over: "All account statements . . . for all accounts of  
26 any type (including but not limited to bank accounts, . . . ) maintained in the name of National  
27 Union of Healthcare Workers [] *or for the benefit of NUHW or in which NUHW has any legal or*  
28 *beneficial interest*" (Dkt. No. 780-1) (emphasis added). Under any reasonable reading, this  
language required NUHW to produce bank account statements that were in its possession, for any  
account that was being maintained to pay its general operating expenses.

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\* Attorney Siegel's declaration of October 20 also stated that he had not been served with plaintiffs' brief of October 14, but plaintiffs served it by messenger on October 14 (*see* Dkt. No. 820).

1 NUHW failed to produce documents for the bank account that has been referred to by the  
2 parties as the Siegel & Yee account. The Siegel & Yee account was referred to in NUHW's  
3 general ledger as the account out of which it was paying its general operating expenses. Plaintiffs  
4 argue that NUHW violated the court order by not turning over the statements. NUHW's best  
5 argument in response is that "Siegel & Yee — not NUHW — has bank statements regarding the  
6 above account" (Dkt. No. 805).

7 We do not know whether this is true. *NUHW was long ago ordered to file a statement*  
8 *under oath* "identifying the bank and account number of the Siegel & Yee account listed in its  
9 general ledger, verifying that there are no documents concerning the Siegel & Yee account, and  
10 stating what happened to the \$265,000 withdrawn from the Mechanics Bank account on  
11 September 9." It did not obey this order. It was given extra time to do so. It still did not. Hence  
12 we cannot know whether NUHW withheld documents, because *it violated the court order*  
13 *requiring an explanation under oath* regarding the Siegel & Yee and Mechanics Bank accounts.  
14 The purpose of that order was to get more facts about what documents, if any, were missing from  
15 the document production about these accounts. It is true that Siegel & Yee was not ordered to  
16 turn over any documents. But it was NUHW that was ordered to explain under oath what  
17 materials it had. There has been a studied effort by NUHW and counsel to evade this order.

18 Turning now to the declaration of Attorney Siegel filed on October 20, this was not by  
19 anyone at NUHW. The declaration did not address whether NUHW had any documents  
20 concerning the Siegel & Yee account. Attorney Siegel did say that NUHW had no "control" of  
21 the bank statements for the Siegel & Yee account. But this did not answer whether NUHW had  
22 possession of any documents. Although Attorney Siegel swore that he believed the bank  
23 statements were not responsive to plaintiffs' document request, that was beside the point. We  
24 were trying to figure out what documents existed on a very specific topic, and the point of the  
25 declaration was to find that out. Finally, the declaration did not clear up what happened to the  
26 \$265,000 withdrawn from the Mechanics Bank account on September 9. On this point the  
27 declaration was based on mere information and belief, no better than hearsay. So, even at the late  
28 date of October 20, NUHW did not comply with the court order.

1 At the hearing on October 21, Attorney Siegel made several unsworn revelations. Upon  
2 inquiry, he confirmed that large amounts of money had indeed been transferred from NUHW to  
3 the Siegel & Yee account and that the account was being maintained for the benefit of NUHW so  
4 it could conduct its business. He revealed that this was a deliberate “scheme” (his word) so that  
5 NUHW could avoid the amount of judgment in this case being levied against that account until  
6 NUHW could raise more money to post a bond. NUHW’s money was moved there and used to  
7 pay ongoing salaries and expenses.

8 Now that the bond has been posted there is no need to be secretive. Now it seems clear  
9 that at the time in question NUHW was trying to hide the ball and stay one step ahead of the  
10 judgment creditor. While Attorney Siegel freely admitted at the hearing what was only suspected  
11 before, the whole point of discovery was to confirm the suspicion. Although plaintiffs figured out  
12 what was going on from the general ledger, the point was that they could not levy the Siegel &  
13 Yee account as *they did not have any identifying information for it* — including the name of the  
14 bank and the account number. Getting more information was a reason for the court-ordered  
15 declaration.

16 When NUHW did eventually post a bond with the Clerk of Court, it mooted discovery as  
17 to its finances. But that does not excuse NUHW’s violation of the order requiring an explanation  
18 under oath back when matters were hanging fire. Much work might have been saved if the  
19 explanation had been forthcoming. The violation was not substantially justified and other  
20 circumstances do not make an award of expenses unjust.

21 Plaintiffs are thus entitled to “the reasonable expenses, including attorney’s fees, caused  
22 by” NUHW’s failure to comply with the order requiring a statement under oath. FRCP  
23 37(b)(2)(C). Plaintiffs, however, have utterly failed to document any fee award and instead have  
24 simply stated that they will do so if they prevail on their motion. But they were under an  
25 obligation to do so concurrent with their motion. We will not prolong this and pile up yet more  
26 time and expenses on satellite litigation over fees. This order finds that plaintiffs shall receive  
27 \$2500.00. This is the undersigned’s reasonable estimate of the percentage of expenses from these  
28 post-judgment proceedings that was caused by NUHW’s order violation. To be clear, this award

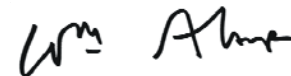


1 is limited to plaintiffs' reasonable expenses incurred by reason of NUHW's disobeying the court  
2 order. No doubt, plaintiffs spent much more than \$2500.00 on the overall discovery effort. But it  
3 did bear fruit. Plaintiffs have now gotten the benefit of the nearly \$900,000 bond that NUHW  
4 posted. This must be taken into account in determining the equities. With that in mind, \$2500.00  
5 will compensate plaintiffs for their lost expenses attributable to the failure to supply the court-  
6 ordered statement. NUHW shall file evidence that it has paid plaintiffs this money by  
7 **NOVEMBER 5, 2010.**

8 Plaintiffs' further request for expenses under 28 U.S.C. 1927 and *Chambers v. NASCO,*  
9 *Inc.*, 501 U.S. 32 (1991), is **DENIED**. The relief granted under Rule 37 is adequate to compensate  
10 plaintiffs.

11 Lastly, plaintiffs contend that "the conduct in which NUHW and its counsel engaged was  
12 not merely vexatious but criminal under California law — as to both NUHW and its counsel."  
13 The lawyers in this case have accused each other of monumental wrongs over the past two years.  
14 If plaintiffs really feel that there has been a professional violation, plaintiffs can consider on their  
15 own whether to refer counsel to the state bar. This order does not endorse that idea one way or  
16 the other.

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18 Dated: October 22, 2010.



19 WILLIAM ALSUP  
20 UNITED STATES DISTRICT JUDGE  
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